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Supreme Court of the United States

OCTOBER TERM 1940

No. 436

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

ESTATE OF JOHN M. ENRIGHT, deceased, JAMES G. ENRIGHT, EMMA E. NEILSON and MILDRED ENRIGHT, executors,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF ESTATE OF CHARLES S. HAIGHT, DECEASED, AS *AMICUS CURIAE*

HAROLD S. DEMING,
Counsel.

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BRIEF ON BEHALF OF ESTATE OF CHARLES S. HAIGHT, DECEASED, AS *AMICUS CURIAE*

The interest of the Estate of Charles S. Haight, deceased, on behalf of which this brief is filed as *amicus curiae* with the consent of both parties, arises out of the pendency before the Board of Tax Appeals (Docket No. 105,784) of a proceeding involving the same questions as presented in the case before this Court, and set forth at page 2 of the brief for respondents.

No duplication will be made herein of respondents' argument, but there will be put before the Court an additional comment upon Section 42 of the Revenue Act of 1934, together with an additional comment upon *Guaranty Trust*

Company v. *Commissioner*, 303 U. S. 493, and *Bull* v. *United States*, 295 U. S. 247, the two principal cases upon which the Government relies in making its argument, not urged before the Circuit Court of Appeals, that the income computing method of the partnership is not determinative of the distributive share of the deceased partner.

POINT I

Section 42 of the Revenue Act of 1934 does not apply to a partnership.

While Section 42 of the Revenue Act of 1934 puts the *decedent's* final return on the accrual basis, the section does not put on the accrual basis *the return of the law partnership* of which decedent was a member.

The application of Section 42 of the Revenue Act of 1934 by its terms is limited to computing the net income of "a taxpayer". Section 801 of the Revenue Act of 1934 provides:

> "Sec. 801. Definitions.
>
> * * * * * *
>
> (14) The term 'taxpayer' means any person subject to a tax imposed by this Act."

A law partnership is not "subject to a tax" imposed by the Act, and therefore is not "a taxpayer". It follows that Section 42 cannot be held to change the accounting method of such a partnership from the cash to the accrual basis by reason of the death of one of the partners.

Where, therefore, the deceased partner was a member of a partnership which at all times was on a cash basis, the partner (and after his death, his estate) was entitled to no distributive share in the partnership income except as and when received by the partnership. As the partnership accrued no income, no *right* could possibly accrue to the decedent (or his estate) until the corresponding *obligation* of the partnership to him (or his estate) came into being.

POINT II

Neither the *Guaranty Trust Company* case nor the *Bull* case supports the Government's contention that the distributive share of a deceased partner is to be computed otherwise than by the method of accounting used by the partnership.

The Government asserts that the items in suit are "taxable as income earned by him" (the decedent) "during his lifetime under the *Bull* and *Guaranty Trust* cases" (p. 7); and that "it is not material that the decedent's interest ascertained on a final accounting should ever have been distributable to him in his lifetime" (p. 13). The Government's argument purports to be based upon *Guaranty Trust Company* v. *Commissioner*, 303 U. S. 493, and *Bull* v. *United States*, 295 U. S. 247. The distinctions between these two cases and the case at bar have been set forth at pages 6-8 of the brief for respondent. The following additional facts emphasize the distinctions.

Examination of the record in the *Guaranty Trust Company* case shows that the Commissioner determined that the decedent's distributive share of the partnership income earned from July 31, 1933, to the date of his death was $63,494.46. This item of $63,494.46 included the cash earnings of the partnership during the period and also uncollected commissions earned during that period in the sum of $13,894.74 and unreported interest on decedent's credit balance for that period and decedent's capital investment (see findings of fact, 34 B. T. A. 384, at 386). The decedent died on December 16, 1933. Both the decedent and the partnership kept their books and filed their tax returns on a cash basis.

The Board of Tax Appeals held that none of the items—"uncollected commissions", "unreported interest" or the decedent's share of the cash earnings of the partnership from July 31, 1933, to the date of death of the decedent—

were required to be reported in the decedent's final income tax return (34 B. T. A. 390).

When the Commissioner filed his petition for review, he made *no assignment of error* as to the decision of the Board with respect to the "uncollected commissions" and "unreported interest". The case came before the Circuit Court of Appeals, therefore, with these items eliminated.

The Circuit Court of Appeals for the Second Circuit held that the decedent's executors must include the decedent's share of the *cash earnings* of the partnership from July 31, 1933, to the date of decedent's death (89 Fed. [2d] 692).

The argument of the taxpayer before the Circuit Court of Appeals was that the decedent's share of the *cash earnings* of the partnership up to the death of the decedent should not be included in the decedent's final return, because the partnership was on an annual accounting basis and no part was distributable, under the partnership provisions of the statute, until the close of the twelve-month accounting period, i. e., on July 31, 1934. The Circuit Court of Appeals rejected the argument and held that the death of the decedent dissolved the partnership, and that the period from July 31, 1933, to December 16, 1933, must be regarded as an accounting period and that decedent's then *distributive share* was taxable to him. In other words, when the case reached the Circuit Court of Appeals, the only question involved was whether the decedent's executors were required to include the decedent's distributive share of the *cash earnings* of the partnership for the preceding fiscal year, ending on July 31, 1933, *plus* decedent's share of the *cash earnings* of the partnership from July 31, 1933, to the date of decedent's death.

The case reached this Court upon the same issue. The Government's brief in this Court specifically stated, page 6, that the petition for review did not assign error to the uncollected commissions and unreported interest items; and that "the decedent's share of the cash profits of the

partnership for the period from August 1, 1933, to December 16, 1933", was "the only item involved in the court below and is the only item now involved in this Court." It is clear, therefore, that when this Court, in its decision, referred to "income, whenever earned" (p. 498) and "profits accrued on the date of his death" (p. 496), this Court was speaking of *cash earnings* of the *partnership* from July 31, 1933, to the date of the decedent's death, computed in accordance with the method of accounting used *by the partnership;* which, *under such method,* represented the distributive share of the decedent, taxable to him under the terms of Section 182, of the applicable Revenue Act, whether actually distributed or not.

Similarly, in the *Bull* case, the decedent's distributive share of $24,124.20 in partnership profits (*actually received* by the partnership and *credited to the decedent on the accounts* of the partnership prior to the death of decedent) was determined by the method of accounting used *by the partnership.*

While it is true that the opinion of this Court does not state whether the partnership was on a cash or accrual basis or whether it had received payment for the services rendered, the Board of Tax Appeals in *Ernest M. Bull, executor,* v. *Commissioner* (7 B. T. A. 993), dealing with the same taxpayer, the same partnership and the same taxable period as were before this Court, stated (p. 993) with respect to the partnership:

> "Its books were kept on the cash receipts and disbursements basis";

and that

> "The decedent's share in the profits of the partnership which had been earned before his death was $24,124.20. This amount *appeared to his credit on the accounts of the partnership at the date of his death.*" (Italics supplied.)

There is no doubt, therefore, that the $24,124.20 held by this Court to be includable as income to the decedent prior to his death was computed in strict accordance with the method of accounting (cash receipts and disbursements basis) employed *by the partnership.*

It is respectfully submitted that the *Guaranty Trust Company* and the *Bull* cases do not support the Government's contentions that the items in suit are "taxable as income earned by him" (the decedent) "during his lifetime under the *Bull* and *Guaranty Trust* cases"; and that it is "immaterial" whether the deceased partner's interest should ever have been distributable to him during his lifetime. On the contrary, they hold that the final return filed for decedent is to include only the *distributive* share of decedent in "cash earnings" or "profits" of the *partnership* during the period to the death of decedent, as determined by the *accounting method of the partnership.*

In the case at bar, the partnership, on a cash basis, accrued no income, and the decedent at the time of his death was not entitled to any distributive share in the items in suit. To hold otherwise would violate not only the accounting method used by the partnership, but also the partnership agreement.

The decision of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully,

HAROLD S. DEMING,
Counsel.

APPENDIX

Statute Involved

REVENUE ACT OF 1934, c. 277, 48 STAT. 680:

SUBTITLE B—GENERAL PROVISIONS.

* * * * * * *

PART IV—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

* * * * * * *

SEC. 42. Period in Which Items of Gross Income Included.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includable in respect of such period or a prior period. (U. S. C. A., Title 26, Sec. 42.)

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SUPREME COURT OF THE UNITED STATES.

No. 436.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Estate of John M. Enright, Deceased, James G. Enright, Emma B. Neilson, and Mildred L. Enright, Executors.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 31, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

Certiorari was granted to review the judgment below[1] because of a conflict between it and *Pfaff* v. *Commissioner*[2] in the Second Circuit. The issue is whether § 42 of the Revenue Act of 1934[3] permits the inclusion, as accruable items, in a decedent's gross income for the period ending with his death of his share of the profits earned, but not yet received, of a partnership, when both the decedent and the partnership reported income on a cash receipts and disbursements basis.

Respondents are the executors of John M. Enright, an attorney and member of a law partnership in New Jersey. Both Mr. Enright and his firm kept their accounts and made their income tax report on a calendar year cash receipts and disbursements basis. He died, testate, November 19, 1934. The partnership agreement provided for the termination of the partnership on the death of any partner and that his estate should have his partnership percentage in the

[1] 112 F. (2d) 919.

[2] 113 F. (2d) 114. See Pfaff v. Commissioner, No. 479 this Term, decided today.

[3] 48 Stat. 680, c. 277: "Sec. 42. Period in which Items of Gross Income Included. The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

"net monies then in the treasury of the firm, plus his like percentage in the outstanding accounts and the earned proportion of the estimated receipts from unfinished business." The will directed that the valuation for the purpose of closing out the partnership should be made by his senior surviving partner, Mr. James D. Carpenter, and by agreement between Mr. Carpenter and the executors a valuation was made of these items as of the date of death for use in the Federal estate tax and New Jersey inheritance tax returns, with the further understanding that the surviving partners would pay over to the executors whatever was ultimately realized out of the valued assets.

Pursuant to this arrangement the interest of Mr. Enright in the uncollected accounts was valued at $2,055.55 and in the unfinished work at $40,855.77. These sums were reported as assets in the estate and inheritance tax returns but were not included in the income tax return made for the decedent for 1934 nor were the sums derived from these assets reported in the estate's income tax for 1934 or later years.

The Commissioner assessed a deficiency because he included in the decedent's return for 1934, under the claimed authority of § 42, *supra* note 3, the items of accounts and unfinished work. Respondents appealed to the Board of Tax Appeals. The Board decided[4] that the evidence did not show the situation of the unfinished work in sufficient detail to enable the Board to determine independently that it was not accruable. The accounts receivable were held accruable. This left the Commissioner's assessment intact.

On appeal the Circuit Court of Appeals reversed the Board. It was of the opinion that the partnership was a tax computing unit separate from its members and that § 42 had the effect of placing the decedent "upon an accrual basis at the date of his death." Consequently his return should be made as it would have been made if the deceased used the accrual method. The Court then reasoned that the requirement of § 182 of the Revenue Act of 1934, including a partner's distributive share of the partnership earnings, whether distributed or not, in the partner's computation of his own net income, put a partner on an accrual basis in accounting for partner-

[4] August 28, 1939, by memorandum opinion. Cf. Lillian O. Fehrman, Executrix, 38 B. T. A. 37.

ship earnings, irrespective of § 42. Consequently § 42 was held not to affect the partnership accounting practices. It was further determined that it was the right to receive payment which made an earning accrue and that as Mr. Enright under the partnership agreement had no right to receive anything from the firm except his proportionate share of the cash receipts, these cash receipts were all that "accrued" to him before his death.

The last sentence of § 42 which requires the inclusion of "amounts accrued up to the date of his death" in computing net income for the period in which his death falls was added by the 1934 Revenue Act.[5] The reports recommended its addition because the "courts have held that income accrued by a decedent on the cash basis prior to his death is not income to the estate, and under the present law, unless such income is taxable to the decedent, it escapes income tax altogether."[6] So § 42 was drawn to require the inclusion of all amounts accrued to the date of death "regardless of the fact that he may have kept his books on a cash basis."[7] With the declared purpose of Congress in mind, we proceed to examine the meaning of the section.

As the questioned items of unfinished work appear in the partnership accounts, we must determine whether such earnings, even if accruable, are includible in the partner's return for 1934. Respondent argues, as the Circuit Court of Appeals held, that § 182[8] accrues, without any effect from the language of § 42, all the earn-

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[5] Cf. Revenue Act of 1932, 47 Stat. 169, c. 209, § 42.

[6] H. Rep. No. 704, 73rd Cong., 2nd Sess., p. 24; S. Rep. No. 558, 73rd Cong., 2nd Sess., p. 28.

This situation followed the decision of the Court of Claims in Nichols *v.* United States, 64 Ct. Cl. 241. A decedent on the cash basis was a member of a partnership dissolved by his death. Commissions earned before death but unpaid to the partnership were valued in the estate tax and collected by the partnership after death for payment to the executors. The Court of Claims held sums paid the executors were part of the corpus and not income.

The Board of Tax Appeals followed the reasoning of the Court of Claims. William G. Frank, Adm., 6 B. T. A. 1071; E. S. Heller, Exec., 10 B. T. A. 53; George Nichols et al., Exec., 10 B. T. A. 919; Estate of A. Plumer Austin, 10 B. T. A. 1055; William K. Vanderbilt, Exec., 11 B. T. A. 291; J. Howland Auchincloss, Exec., 11 B. T. A. 947; William P. Blodget et al., Exec., 13 B. T. A. 1243; Jackson B. Kemper, Adm., 14 B. T. A. 931; Maurice L. Goldman, 15 B. T. A. 1341.

[7] H. Rep. *supra.*

[8] "SEC. 182. Tax of Partners. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

ings that are includible in a partner's return, and that since the partnership method of keeping its books did not treat unfinished business as receipts, only the earnings actually collected are a part of the partner's distributive share under § 182.

We think such a conclusion is erroneous. The partnership agreement and the subsequent arrangement between the executors and the surviving partners called for a valuation on Mr. Enright's death and a dissolution as of that day. This necessitated an accounting of partnership earnings for this period. By the terms of the agreement, as would have been necessary anyway, the earned proportion of the unfinished business was to be valued to determine the decedent's interest in the partnership assets.[9] Assuming at this point that the unfinished business is accruable, this accounting as of the time of death would show the partnership income for the taxable year of the partnership.[10] As the net income of the partnership is to be accounted for in the deceased partner's return, without consideration of the period over which the income is earned, the fact that the payment for the unfinished business will not be collected until another taxable year is immaterial. "Circumstances wholly fortuitous may determine the year in which income, whenever earned, is taxable."[11] The "distributive share" referred to in § 182 does not mean available in cash for payment to the partner. It means only that gains attributable to the partner's interest in the firm were earned. Partnership returns may be made on a different basis of computation than those of the members.[12] Thus because of the

[9] We do not consider or decide whether this accounting for a fractional year may affect the individual returns of surviving partners. Neither do we appraise the effect of agreements for continuation of an interest in the partnership after death. See Bull *v.* United States, 295 U. S. 247.

If the partnership had been upon an accrual basis which treated accounts as accrued upon a determination of the amount of fees, it may be that a decedent's interest would not be distributable until a later year. It might then be income to the estate, even though the value of the right to receive it was included in the estate return. A conclusion as to this is unnecessary and is pretermitted. Cf. note 23, the cases cited in note 6 and Bull *v.* United States, 295 U. S. 247, 255, 256-57.

[10] "SEC. 48. Definitions. When used in this title—

(a) Taxable Year.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made."

[11] Guaranty Trust Co. *v.* Comm'r., 303 U. S. 493, 498.

[12] Truman *v.* United States, 4 F. Supp. 447; §§ 183 and 187.

partnership arrangement and agreement, the value of the unfinished business must be determined as of the date of death. Further the result, under the assumption here that it is an accrual, is a distributive share and is to be carried into the partner's return. Respondent's argument that the requirement of § 182, including all distributable shares in the partner's return, puts all partnership returns on the accrual basis fails to give weight to the fact that a partnership on the cash method shows only cash receipts as a partner's distributive share. The requirement to account for a distributive share, although the share is actually not distributed, is not a requirement to account for partnership income on an accrual basis. Since a partner's return of his partnership earnings would vary, dependent upon whether the partnership used the cash or accrual method of accounting, we do not agree with respondent's suggestion.

We turn now to whether this valuation of the decedent's interest in the partnership is an accrual of income which must be reflected in the income tax or a valuation of assets only reflected in estate or inheritance reports. This partnership uses the cash receipts method. There was no customary accounting system to determine whether the value of services rendered should be accrued before payment. Under such circumstances, we are of the view that items of partnership income properly accrued should be included in the income tax return of the deceased partner. This will cause the accrued items of partnership returns to be included in the income tax return of a deceased partner, whether the partnership method is accrual or cash.[13] Furthermore, an accrual of compensation for the unfinished business seems sound in view of the purpose of the enactment of § 42.

The meaning of "amounts accrued up to the date of his death" is clear as to fixed rent, interest, salary or wages for personal services and other similar income which may readily be attributed to a particular period. There are like deductions such as interest and taxes.[14] The uncertainty as to the meaning arises in the field of personal service from items which cannot be accounted for on a basis of successive equal units of time. Examples of the difficulty

[13] The inevitable variations of "accrued" which depend upon established accounting practice do not destroy the principle.

[14] Cf. United States v. Anderson, 269 U. S. 422.

are the value, prior to a successful result, of services rendered on a contingent basis, done on a quantum meruit whether that would or would not vary with the outcome, or exploratory or preliminary steps looking towards final accomplishment.

While "accrue" and its various derivatives are not new to the nomenclature of accounting or taxation, its use has not sufficed to build it into a word of art with a definite connotation when employed in describing items of gross income. The 1913 Act[15] put the taxpayer on an actual cash receipt and disbursement basis. The 1916 Act[16] gave the taxpayer the option of reporting on either the cash or accrual basis and the 1918 Act limited the return to the method of accounting regularly employed unless otherwise directed by the Commissioner of Internal Revenue.[17] A similar provision covers the year here in question.[18] That the meaning to be attributed to "accrued" as used in § 42 is to be gathered from its surroundings is emphasized by § 48, Definitions, which says:

"(c) Paid, incurred, accrued.—The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part."[19]

It is to be noted that no change was made by the 1934 Act in the § 48 definition of "accrued."[20] Yet, it is obvious that the definition is inapplicable since a taxpayer on a cash basis cannot have a "method of accounting" by which the meaning of accrual is fixed. Consequently it is beside the point to give weight to provisions of the regulations or accounting practices which do not recognize accruals until a determination of compensation.[21] Such provisions when applied bring the income into succeeding years. It has been frequently said, and correctly, that § 42 was aimed at putting the cash receipt taxpayer on the accrual basis.[22] But that statement

15 38 Stat. 114 at 166.

16 39 Stat. 756, §§ 8(g) and 13(d).

17 40 Stat. 1057, § 212(b).

18 48 Stat. 680, § 42.

19 Cf. Ernest M. Bull, Exec., 7 B. T. A. 993, 995.

20 Cf. § 48(c) of the Revenue Act of 1932, 47 Stat. 188.

21 Regulation 86, Art. 42-1.

22 Lillian O. Fehrman, Exec., 38 B. T. A. 37; Estate of Wilton J. Lambert, 40 B. T. A. 802, 806; Estate of G. Percy McGlue, 41 B. T. A. 1186, 1193; Enright *v.* Commissioner, 112 F. (2d) 919, this case below.

does not answer the meaning of accrual in this section. Accounts kept consistently on a basis other than cash receipts might treat accruals quite differently from a method designed to reflect the earned income of a cash receipt taxpayer. Accruals here are to be construed in furtherance of the intent of Congress to cover into income the assets of decedents, earned during their life and unreported as income, which on a cash return, would appear in the estate returns. Congress sought a fair reflection of income.[23]

Accrued income obviously connotes more than interest. In *United States* v. *American Can Company*,[24] this Court approved an accrual basis where "pecuniary obligations to or by the Company were treated as if discharged when incurred." In *United States* v. *Anderson*[25] accruals of fixed annual charges, e. g., taxes payable in another year, were permitted against determinable gross income. "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income."[26] The completion of the work in progress was necessary to fix the amount due but the right to payment for work ordinarily arises on partial performance. Accrued income under § 42 for uncompleted operations includes the value of the services rendered by the decedent, capable of approximate valuation whether based on the agreed compensation or on quantum meruit. The requirement of valuation comprehends the elements of collectibility.[27] The items here meet these tests and are subject to accrual.

The judgment of the Circuit Court of Appeals is reversed and the decision of the Board of Tax Appeals affirmed.

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[23] It is immaterial that all possibility of escaping an income tax is not barred, as for instance the increased value of asset items in an estate return. Act, 113(a)(5) " . . . the entire field of proper legislation [need not] be covered by a single enactment." Rosenthal *v.* New York, 226 U. S. 260, 271; cf. Keokee Coke Co. *v.* Taylor, 234 U. S. 224, 227.

[24] 280 U. S. 412, 417.

[25] 269 U. S. 422, 437.

[26] Spring City Co. *v.* Commr., 292 U. S. 182, 184; Guaranty Trust Co. *v.* Commr., 303 U. S. 493, 498.

[27] Cf. Parlin, Accruals to Date of Death, 87 U. of Pa. L. Rev. 294, 301; Farrand & Farrand, Treatment of Accrued Items on Death, 13 So. Cal. L. Rev. 431.